Filed 3/9/09 Scott v. Los Angeles Freightliner CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LILLIE M. SCOTT, Plaintiff and Appellant, v. LOS ANGELES FREIGHTLINER et al., Defendants and Respondents.	B206755 (Los Angeles County Super. Ct. No. BC375682)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Law Offices of David S. Lin and David S. Lin for Plaintiff and Appellant.

Peterson, Oliver & Poll, Larry D. Peterson and Maxine S. Mak for Defendants and Respondents.

Plaintiff and appellant Lillie Mae Scott appeals from an order of dismissal after the court sustained without leave to amend the demurrer of defendants and respondents Los Angeles Freightliner ("LAF") and Ricardo Long to her first amended complaint. Scott contends the trial court erred in denying leave to amend. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On or about July 31, 2006,[1] Scott purchased from LAF a used 18-wheeler truck for $32,660.06, inclusive of taxes and fees. She signed each page of a four-page contract. The fourth page stated, under the heading, "WARRANTIES SELLER DISCLAIMS," the following: "If you do not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide." Scott was not given a written warranty, nor did LAF enter into a written service contract with Scott.[2] LAF would also later assert that Scott signed a second

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[1] Plaintiff asserts that the written contract was dated July 31, 2006. The contract is undated. However, the contract indicates that interest will begin accruing as of July 24, 2006, and the "Warranty Disclaimer" document (discussed below) indicates that the truck was sold on July 21, 2006.

[2] In her reply brief on appeal, Scott argues that there was no "indisputable evidence that was submitted and considered by the trial court judge at [the] time of the hearing on the [demurrer] that no such further written warranty was provided or that a subsequent service contract was not entered into thereafter . . . ." While technically true, the argument is misleading. Scott never alleged the existence of a further warranty or service contract; her suit was based solely on the written contract. Moreover, Scott

"Warranty Disclaimer" document,[3] although Scott would attempt to deny it.

On August 1, 2006, Scott took possession of the truck and attempted to make a haul with the truck. She could not complete the run as the truck's engine cut off six times due to serious oil leakage. The truck continued to break down "due to serious mechanical and electrical problems." Some time later, the truck's engine "blew up." Plaintiff informed Long, LAF's manager, of the condition of the truck and demanded that LAF pay for the repair of the truck (and her other damages) or rescind the sale; Long refused.

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signed written discovery responses representing that LAF "declined [her] request for a written warranty and a request to enter into a service contract." Given these circumstances, the lack of a further warranty or service contract is undisputed.

[3] The "Warranty Disclaimer" reads, in pertinent part, as follows: "The undersigned customer specifically understands that this (TRUCK/TRACTOR) is purchased 'as is' and 'where is' without a warranty of any kind and further does elect to forego any and all warranties in consideration for a discounted price on the aforementioned (TRUCK/TRACTOR). [¶] **THE SELLER, *LOS ANGELES FREIGHTLINER*, HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND *LOS ANGELES FREIGHTLINER*, NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE. [¶] THE UNDERSINGED FURTHER ACKNOWLEDGES THAT NO SALESPERSON, SALES MANAGER OR OTHER PERSON *AT LOS ANGELES FREIGHTLINER* HAS AT ANY TIME MADE ANY PROMISES, REPRESENTATIONS OR STATEMENTS NOT CONSISTENT WITH THE PROVISIONS SET FORTH IN THIS WARRANTY DISCLAIMER EXCEPT AS DESCRIBED BELOW: [LARGER TYPE FOLLOWS] NONE – AS IS[.]** [¶] I, Lillie M Scott have read this document and clearly understand that unless otherwise delineated in this document that this (TRUCK/TRACTOR) is being purchased without warranty of any kind." The document then bears Scott's signature.

On August 9, 2007, Scott brought the instant action against LAF and Long, alleging causes of action for: (1) breach of contract; (2) breach of the implied warranty of fitness for a particular purpose; and (3) fraud. The operative complaint is Scott's first amended complaint, filed October 11, 2007. The breach of contract cause of action is based on the truck having mechanical and electrical problems when sold. The breach of implied warranty cause of action is based on the truck not being suitable for the particular purpose of long trucking hauls. The fraud cause of action is based on allegations that on August 8, 2006 [sic], LAF's salesperson, Raphael Jaramillo, falsely represented that the truck was in good condition, inducing Scott to purchase it. Scott attached to her complaint the written contract for the sale of the truck, but not the Warranty Disclaimer.

On November 2, 2007, defendants demurred to the first amended complaint. As to the cause of action for breach of contract, defendants argued that they fully performed the contract by transferring the truck, as is, to plaintiff. As to the breach of implied warranty cause of action, defendants relied on the Warranty Disclaimer. As to the fraud cause of action, defendants argued that the allegations were conclusory. Defendants also noted that Scott had alleged the misrepresentations were made on August 8, 2006, a date *after* she had purchased the truck.

Scott's opposition to the demurrer did not deny that she had signed the Warranty Disclaimer. Instead, Scott argued that the Warranty Disclaimer is not effective because the truck was sold with known defects. Scott argued as follows: "Defendant claims that Plaintiff fails to state a cause of action for breach of implied warranty because all

implied warrant[ies] were excluded by conspicuous language such as 'as is', 'with all faults' and the mention of the word, 'merchantability'. Defendant further alleges that Plaintiff signed a Warranty Disclaimer that excluded the implied warranty because it contained the aforementioned language of disclaimer. However, Defendant does not dispute the fact that the subject truck had the mechanical and electrical problems alleged by plaintiff. Instead, Defendant merely argues that the implied warranties were disclaimed. In effect, Defendant argues that even though Defendant knew that the truck had serious mechanical and electrical defects at the time it sold the truck to Plaintiff, the Warranty Disclaimer which Plaintiff signed excluded all warranties and that the disclaimer protects Defendant from liability. [¶] Plaintiff contends that Defendant cannot protect itself from liability by relying on the conspicuous language of the disclaimer, such as 'as is', 'with all faults' and 'merchantability' when it knowingly sells a defective product to an unsuspecting buyer. The alleged conduct of Defendant by knowingly selling the defective truck to Plaintiff renders the claimed disclaimer by Defendant ineffective. The signing of a Warranty Disclaimer by a Plaintiff does not totally protect a defendant from liability if the disclaimer is defective. [Citations.]" This latter sentence is something of a non sequitur. Scott's argument was that the disclaimer was ineffective because the *truck* was defective, but she then relied on authority that a disclaimer is ineffective when the *disclaimer* is defective. Yet at no point did Scott set forth any facts supporting an argument that the Warranty Disclaimer itself was in some way defective.

A hearing was held; Scott has declined to designate the reporter's transcript of that hearing as part of the record on appeal.[4] The court sustained the demurrer without leave to amend, and dismissed the action. Scott filed a timely notice of appeal.

CONTENTIONS ON APPEAL

On appeal,[5] Scott does not contend that the trial court erred in sustaining defendants' demurrer to her complaint; she argues only that the court abused its discretion in denying her leave to amend. She does not base this argument on any theory raised before the trial court. Instead, she argues that she should be granted leave to amend in order to allege that, although she signed the paper on which the Warranty Disclaimer now appears, she had signed the paper in blank and the Warranty Disclaimer terms were subsequently added to the document.[6] Moreover, Scott makes no argument as to her causes of action for breach of contract and fraud, relying solely on her contentions regarding the Warranty Disclaimer and the breach of implied warranty cause of action. In response, defendants rely on Scott's discovery responses which

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[4] It is the appellant's burden to provide an adequate record on appeal. To the extent the record is inadequate, we make all reasonable inferences in favor of the judgment. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

[5] Scott is represented by new counsel on appeal.

[6] Scott states that she placed the "essence" of this argument before the trial court when she stated the legal proposition that a disclaimer is not completely effective if the disclaimer is defective. This interpretation is strained.

admit the validity of the Warranty Disclaimer.[7] Defendants also rely on the waiver of warranties in the written sales contract itself.

DISCUSSION

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has

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[7] Specifically, Scott was asked to admit that she signed Exhibit B, a copy of the Warranty Disclaimer. Scott admitted that she signed Exhibit B. When asked to admit that Exhibit B "is [a] true and correct copy of the Warranty Disclaimer received on or about the date of the purchase of the truck," Scott responded, "Admitted, except that [defendant] did not give to [Scott] a true and correct copy of the Warranty Disclaimer on or about the date of the purchase of the truck." We need not consider the validity of the Warranty Disclaimer in order to resolve this appeal. Nonetheless, we find Scott's suggestion in her reply brief that her discovery responses do not undermine her current argument because the responses were "prepared by [her] former legal counsel, not [appellate] counsel" to be somewhat disingenuous. Scott signed her discovery responses under the statement, "I have [sic] the foregoing Responses and know the contents thereof and certify that the same are true of my own knowledge." Scott's argument that her admissions that she *signed* Exhibit B and that it is *a true and correct copy* somehow leave room for the assertion that she signed only a blank paper is wholly implausible.

abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) "[F]acts appearing in exhibits attached to the complaint . . . , if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.) "To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

2. *The Dismissal Must Be Affirmed*

We again note that Scott does not argue that the trial court erred in sustaining the demurrer; she argues only that she should be granted leave to amend. Furthermore, the sole argument in her brief is that she should be granted leave to amend in order to allege that the Warranty Disclaimer is invalid because she had signed only a blank piece of paper onto which the Warranty Disclaimer language was later added.

Yet the validity of the warranty disclaimer is irrelevant, given that Scott's action is based on the written sales contract which provided, "the Seller makes no warranties, express or implied on the vehicle, and there will be no implied warranties of

merchantability or of fitness for a particular purpose." In the absence of any such warranties, Scott's cause of action for breach of the implied warranty of fitness for a particular purpose fails. Scott makes no argument that this language is not binding or does not otherwise bar her breach of implied warranty cause of action.

As to the remaining causes of action, for breach of contract and fraud, Scott fails to indicate in what way she could amend her complaint to state a proper cause of action. She argues only that the Warranty Disclaimer, even if valid, "did not specifically address the other pertinent claims alleged by [Scott], those for breach of contract and fraud."[8] Scott makes no further argument that the demurrer should not have been sustained with respect to these causes of action, nor that she could amend her complaint to properly allege them. To the extent Scott asserts that her breach of contract and fraud causes of action should proceed, the issues are presented in the most summary fashion, with no real argument, factual discussion, or citation to authority. We therefore decline to address them. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

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[8] A plaintiff may claim fraud in the inducement of a contract containing a provision disclaiming any fraudulent misrepresentations. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 794; *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 301.) Such a provision, however, may put the plaintiff on notice of possible defects, and is a factor to consider in whether the plaintiff's reliance was reasonable. (*Hinesley v. Oakshade Town Center, supra,* 135 Cal.App.4th at p. 302.)

DISPOSITION

The order of dismissal is affirmed. Respondents shall recover their costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.